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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-26

JAMES SANFORD BURNETTE,
PETITIONER,

VS.

THE STATE OF TENNESSEE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON AND THE SUPREME COURT OF TENNESSEE

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION OF THE STATE OF ALABAMA, AMICUS CURIAE

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THE INTEREST OF THE STATE OF ALABAMA, AMICUS CURIAE

The petitioner is presently under an unexecuted sentence rendered by an Alabama Court. Alabama is seeking to extradict the petitioner from Tennessee in order to execute its sentence. The petitioner is resisting extradition to Alabama by the instant litigation. The ultimate question is Alabama's right to enforce its sentence. Therefore, the State of Alabama is the real party in interest in these proceedings.

The State of Alabama has sought the consent of the petitioner to appear as an *amicus curiae* in these proceedings.

The petitioner has not, thus far, granted or denied his consent. The State of Alabama, therefore, is appearing, sponsored by its Attorney General, pursuant to Rule 42(4) of the Rules of this Honorable Court.

STATEMENT OF THE CASE

On August 22, 1972, the petitioner was convicted in the Circuit Court of Talladega County, Alabama, of obtaining money by false pretenses and sentenced to ten (10) years imprisonment. At the time of sentencing, the petitioner was advised of his right to appeal his conviction. The petitioner was specifically advised by the trial judge that if notice of appeal was given at the time of sentencing, he had the option under State law of having his sentence stayed pending appeal or of commencing his sentence immediately. The petitioner chose the former option, giving notice of appeal with suspension of sentence. Sentence was suspended and appeal bond was set at $12,000. Two days later, the appeal bond was reduced by the trial judge. On the same day the petitioner gave his appeal bond and was released thereunder. (Record in *Burnett v. State*, 50 Ala. App. 630, 282 So. 2d 70 [1973], pp. 149-153).

While his appeal from his Alabama conviction was pending, the petitioner was arrested by Federal authorities in Knoxville, Tennessee, on Federal charges. He was tried on those charges on December 12, 1972, convicted and sentenced on December 29, 1972, to the Federal penitentiary at Terre Haute, Indiana. On August 7, 1973, the petitioner entered the Federal penitentiary at Terre Haute. Seven (7) days later, on August 14, 1973, the Court of Criminal Appeals of Alabama affirmed the petitioner's Alabama conviction. (Petition, pp. 3-4 and *Burnette v. State*, 50 Ala. App. 630 282 So. 2d 70 [1973]).

On September 30, 1973, Alabama lodged a detainer against the petitioner with the Federal prison authorities. On February 18, 1975, the petitioner was released from the Federal penitentiary. At that time both Tennessee and Alabama had detainers on the petitioner. The petitioner waived extradition to Tennessee but refused to waive extradition to Alabama. He was taken into custody by Tennessee authorities. On May 12, 1975, Alabama began extradition procedures which the petitioner resisted and continues to resist. (Petition pp. 5-6).[1]

QUESTION PRESENTED

There are numerous procedural and Constitutional questions raised by this ligitation, however, in this brief the *amicus* will limit itself to the issue of the merits of the petitioner's ultimate claim. This issue is as follows:

What effect if any does a Federal conviction, sentence and execution of sentence have on a prior state sentence which was being appealed at the time of the Federal conviction and the convict was at large on appeal bond?

ARGUMENT

The petitioner claims that his Federal conviction, while he was at large on appeal bond, utterly canceled out his Alabama sentence. In support of this claim, he cites numerous cases, none in point.

Smith v. Swope, ([19th Cir., 1937] 91 F. 2d 260), and

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[1]In addition to his habeas corpus litigation in the Tennessee State Courts, the petitioner also filed a habeas corpus petition in the U.S. District Court for the Eastern District of Tennessee. This petition was dismissed on March 12, 1976. **Burnette v. Hollingsworth** (E. D. Tenn.) C. A. #1-76-10.

the cases cited therein[2] all conserned the running of Federal sentences under Federal law, and all addressed the question of the effect of an *improper* release of the convict by a Federal official to another jurisdiction. In each case the release was over the prisoner's objection. In no case did the court hold that the improper release invalidated the sentence, as the petitioner claims, but only that the sentence continued the run. See in particular *White v. Pearlman,* (10th Cir., 1930) 42 F. 2d 788. In the Petitioner's case the sentence at issue is a State sentence controlled by State law. Alabama did not release the petitioner to the Federal authorities[3] but enlarged him on appeal bond on his motion and at his request. This was proper under long established State law. The petitioner could have commenced his sentence pending appeal but chose not to do so.

The amicus curiae does not know why *Thompson v. Bannan,* ([6th Cir., 1962] 298 F. 2d 611)is cited by the petitioner. It certainly does not stand for the proposition for which it is cited. Conceivably, it is cited by mistake.

Shields v. Beto, ([5th Cir., 1967] 370 F. 2d 1003) comes closer than any case to supporting the petitioner's claims, but it is still miles wide of the mark. In *Shields* the State of Texas released a convict with a forty-year sentence to another State. Texas placed no detainer against the convict and made no effort at all to obtain custody of him for the next twenty-eight (28) years. On the occasion of the convict's being sentenced for another offense, a Texas trial

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[2]These include **Albori v. United States,** (9th Cir. 1933) 67 F. 2d. 4; **White v. Pearlman,** (10th Cir., 1930) 42 F. 2d 788, and **In Re Jennings,** (Cir. Ct. E.D. Mo, 1902) 118 F. 479.

[3]As will be discussed below, if Alabama has released the petitioner to Federal authorities for trial and execution of his Federal sentence, the effect would have been the same. See page 5.

court ordered the forty-year sentence recommenced. The Fifth Circuit held that the Texas trial court had no jurisdiction to reinstate the old sentence. Whatever else may be be said about *Shields,* it is no doubt *sui generis.* No other Circuit has cited it, and the Fifth Circuit has limited the rule to its own peculair facts. The *Shields* rule applies only where: (1) the State turns the convict over to another jurisdiction and (2) thereafter indicates no interest in him whatsoever for (3) a long time. The prisoner must be turned over by the State, release on parole is not enough *Clifton v. Beto,* [5th Cir., 1969] 411 F. 2d 1226), but merely turning a prisoner over to another jurisdiction has no effect on the State sentence. *Dorrough v. Texas,* (5th Cir., 1971) 440 F. 2d 1063; *Mills v. Beto,* [illegible]h Cir., 1973) 477 F. 2d 124; *Weathers v. Henderson,* (5th Cir., 1973) 480 F. 2d 559; *Bilton v. Beto,* (5th Cir., 1968) 403 F. 2d 664. Even an erroneous transfer has no effect (*Hanks v. Wideman,* [5th Cir., 1970] 434 F. 2d 256) nor, does a lack of vigorous pursuit of the convict affect a sentence. In *Piper v. Estelle,* ([5th Cir., 1973] 485 F. 2d 245) the Court discussed *Shields* in these terms:

> "Shields v. Beto was not intended to constitute a trap for unwary state officials. It is founded upon the due process clause of the Fourteenth Amendment and requires that 'action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice, Shields at 1004. The facts in Shields are not at all analogous to those in the case at bar. Before expiration of the Texas sentence he was then serving, Shields had been extradited to Louisiana to complete a jail term. Texas filed no detainer, and Shields was ultimately released on parole in Louisiana. Eighteen years after his release and 28 years after his extradition to Louis-

iana, Texas sought to compel Shields to serve the remainder of his Texas sentence. We held that under these circumstances Texas had demonstrated such a lack of interest in Shields as to waive jurisdiction over him.

"In cases based upon the principles of Shields it is not sufficient to prove official conduct that merely evidences a lack of eager pursuit or even arguable lack of interest. Rather the waiving state's action must be so affirmatively wrong or its inaction so grossly negligent that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served in the aftermath of such action or inaction." 485 F. 2d 245, 246.

Comparing the petitioners case to *Shields* makes it difficult to avoid one further quotation from *Piper;* to-wit: "Any claim that . . . [the State's conduct in this] . . . constituted a lack of interest of the dimensions present in *Shields* is ridiculous." 485 F. 2d 245, 246. See, also *Holtzinger v. Estelle,* (5th Cir., 1974) 488 F. 2d 517.

The petitioner cites *Buchalter v. New York,* (319 U.S. 427, 87 L.Ed 1492, 67 S. Ct. 1716 [1943] for the proposition that the States must enforce criminal laws in accordance with due process, which is certainly true.[4] How did the State of Alabama violate due process? By allowing the petitioner an appeal bond? By allowing him under such

[4]This Honorable Court found no violation in **Buchalter.** The petitioner also cites **Foster v. Illinois,** (329 U.S. 712, 91 L.Ed. 618, 67 S. Ct. 1716 [1947]). **Foster** was an order denying certiorari sought to review **People v. Foster,** (394 Ill. 194, 68 NE 2d 252 [1946]), which is not in point.

bond to leave the State? Why a fugitive left a State is not relevant in extradiction proceedings. *Drew v. Thaw,* 235 U.S. 432, 59 L.Ed 302, 35 S. Ct. 137 (1914). Even where one leaves a State with the knowledge and consent of State officials, he is subject to extradition. *Bassing v. Cady,* 208 U.S. 386, 52 L.Ed 540, 28 S. Ct. 392 (1908). The petitioner claims that Alabama could have done more to obtain custody of him from the Federal Government. To be sure Alabama did not attempt to obtain custody from the Federal Government by physical force, such would have been unconstitutional. *Ableman v. Booth,* 21 How. 506, 62 U. S. 506, 16 L. Ed. 169 (1859). The question of the custody of persons who are under sentence in one jurisdiction and wanted for trial or execution of sentence in another is one of comity between sovereigns which the prisoner has no standing to raise. *Ponzi v. Fessenden,* 258 U. S. 254, 66 L.Ed. 607, 42 S. Ct. 309, 22 ALR 879 (1922); *Weathers v. Henderson* (5th Cir., 1973) 480 F. 2d 559.

In placing its detainer against the petitioner, the State of Alabama did all it could do to execute its sentence until the petitioner was released from Federal custody. Throughout the period from the petitioner's conviction and including the present, Alabama's officials have endeavored to execute the petitioner's sentence. These efforts in chronological order included: an appeal bond, a detainer filed with the Federal prison, extradition procedures, forfeiture of the appeal bond when the petitioner failed to appear following his release from the Federal prison, resisting the petitioner's Federal habeas corpus petition and this brief. The only reason Alabama has not done more is because there is no more to do.

One final word about the petitioner's four "Reasons

For Granting This Writ." (Petition p. 9). Reason Number 3 reads as follows:

"Three

> "The Petitioner will suffer irreparable harm and injury if this Petition is not granted, in that he will be forced into a penitentiary in the State of Alabama and will thus be effectively denied access to this or any other court."

This statement should come as some surprise to the State and Federal Courts which sit in the State of Alabama, the United States Court of Appeals for the Fifth Circuit and this Honorable Court. Alabama prisoners file a veritable blizzard of writs everyday is various Courts.

CONCLUSION

In conclusion the State of Alabama, *amicus curiae*, respectfully submits the following:

1. The petitioner's claim is frivolous.

2. The petitioner's habeas corpus action in the courts of the State of Tennessee represents nought but an effort to delay the lawful execution of the sentence lawfully rendered against him by the Circuit Court of Talladega County, Alabama.

3. The instant petition represents a further effort on the part of the petitioner to further delay the execution of his sentence.

4. The judgment and decisions of the Honorable Courts of the State of Tennessee are patiently correct.

5. The writ is due to be denied.

Therefore, the State of Alabama, *amicus curiae* respectfully prays that the writ be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, *amicus curiae,* in the above-styled cause do hereby certify that on this —— day of ————————, 1976, I did serve the requisite number of copies of the foregoing Brief and Argument on the attorneys for the parties by mailing said copies to them, first class postage prepaid and addressed as follows:

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